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No. 07-1593

In the Supreme Court of the United States

GRETCHEN DYKSTRA, COMMISSIONER, DEPARTMENT OF CONSUMER AFFAIRS OF THE CITY OF NEW YORK, et al.,
Petitioners,

v.

AUTOMOBILE CLUB OF NEW YORK, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a compelling reason exists to grant the petition, where the Second Circuit's analysis of Petitioners' highly restrictive towing scheme was addressed at determining whether the scheme was "genuinely responsive to safety" and where the legal standard applied does not conflict with a decision of this Court or of any other circuit.

II. Whether review by this Court would be futile where Respondent's claim of direct injury under the Commerce Clause provides a viable alternative to its claim of preemption.

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PRELIMINARY STATEMENT

Petitioners fail to present this Court with a "compelling reason" to support an exercise of jurisdiction. *See*, Sup. Ct. R. 10. Rather, they engage in a clever linguistic exercise to argue that the Second Circuit subtly but significantly altered this Court's holding in *City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424 (2002) to improperly require proof of efficacy. The Second Circuit required no such proof. The Second Circuit simply noted the dearth of evidence introduced by Petitioners to support their argument that the challenged portions of the scheme had actually been effective in promoting safety. Pet. App., 12a-13a[1] ("The City argues that the regulations have helped reduce chasing, which has correspondingly improved public safety.").

Even with their contrived and inaccurate analysis of the legal standard applied by the Second Circuit, Petitioners are still forced to parse the caselaw to create the impression that a split of authority exists. It takes little effort, however, to realize that the circuits have all uniformly applied the *Ours Garage* standard. In all of the cases relied upon in the petition, the circuits looked beyond mere statements of intent in the legislative history and focused on identifying a nexus between the challenged regulations and the stated legislative purpose. Since, this approach is congruent with the standard applied in

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[1] "Pet. App. __" refers to the Appendix to Petitioner's Petition for a Writ of Certiorari.

this case, there is no conflict worthy of this Court's review.

In addition to the fact that no genuine conflict exists, granting the petition would be futile. Petitioners concede that the Second Circuit declined to reach an opinion of Respondent's claim of injury arising under the Commerce Clause. Petitioners mischaracterize the basis for the claim, which is unquestionably still viable and would provide an alternate basis for the decision below.

STATEMENT OF THE CASE

In enacting the Federal Aviation Authorization Act of 1994 (the "FAAA Act"), Congress preempted regulation of motor carriers, including tow trucks, "...related to a price, route, or service of any motor carrier ... with respect to the transportation of property. 49 U.S.C. §14501(c).[2] As an exception to this general rule, however, the FAAA Act saved from preemption those laws passed pursuant to a State's "safety regulatory authority." 49 U.S.C. §14501(c)(2)(A). In 2002, this Court held that only those laws that are "genuinely responsive to safety concerns" are saved from preemption." *Ours Garage*, 536 U.S. at 442.

In a case decided prior to *Ours Garage*, the Second Circuit held that the FAAA Act's safety exception saves laws "reasonably related" to safety. *Ace Auto*

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[2] Petitioners concede that the portions of its scheme at issue fall within the scope of regulations preempted by the FAAA Act.

Body & Towing, Ltd. v. City of New York, 171 F.3d 765, 777 (2d Cir. 1999). Recognizing that this Court's decision in *Ours Garage* represented a stricter standard than was set forth in *Ace Auto Body*, the Second Circuit altered its approach in *Loyal Tire & Auto Center v. Town of Woodbury*, 445 F.3d 136, 145 (2d Cir. 2006).

Following *Ours Garage*, the Second Circuit applies a two part test to decide whether a regulation is genuinely responsive to safety. First, the Second Circuit looks to the legislative history for any "specific expressions of legislative intent" which is then followed by an assessment of the safety justifications asserted "in light of the existing record evidence." *Loyal Tire*, 445 F.3d at 145. The Second Circuit applied this two part test to the instant case and held that Petitioners failed both steps. Pet. App., 9a.

Petitioners seek to vindicate a multi-faceted regulatory scheme that controls many aspects of the towing business. Of particular importance, the scheme contains an extraordinarily broad definition of towing that requires all tow trucks within the City of New York to first obtain a license or else risk seizure. Pet. App., 3a. The broad definition of towing did not comprise part of the original enactment of the regulatory scheme but was contained in later amendments that sought to strengthen the initial regulations. Pet. App., 11a.

Notwithstanding this broad definition of towing, both courts below found that from 1987 until 2004, the Petitioners had a policy of non-enforcement of the regulatory definition of towing. Pet. App., 4a-6a. This

policy led to minimal enforcement of the scheme – particularly the seizure of unlicensed non-City tow trucks. Pet. App., 4a. The abrupt termination of this policy led to a rash of seizures and the commencement of this action.

Applying the two part test of *Loyal Tire*, the Second Circuit held that Petitioners failed – on both parts – to meet their burden of proof that the challenged regulations were "genuinely responsive to safety." First, the Second Circuit reviewed the legislative history in search of specific findings or statements of intent explaining the rationale and purpose behind the broad definition of towing designed to restrict out-of-City tow trucks. The Second Circuit recognized that the primary impetus behind the regulatory scheme was to address the problem of chasing[3], but further held that the scheme "was also motivated by economic factors, such as encouraging industry efficiency and eliminating the predatory prices charged by chasing towers." Pet. App., 10a. Notwithstanding this general statement of intent, the court below noted that the legislative history did not explain how the expanded definition of towing would work to deter chasing.[4]

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[3] Chasing involves tow trucks monitoring police transmissions to learn of accidents and then racing to the scene in search of lucrative body work.

[4] This aspect of the test was of critical importance to the lower court. At oral argument below, the panel noted its difficulty in locating any legislative history surrounding the amendments to the regulatory scheme that resulted in the expanded definition of towing and provided the Petitioners with the opportunity to submit post-argument evidence regarding the legislative history

Pet.App., 12a. ("The legislative history is silent on how those trucks not engaged in chasing, or those merely driving through New York City threaten public safety and how the expanded definition of 'towing' is genuinely responsive to those concerns."). Ultimately, the Second Circuit correctly concluded that the legislative history failed to establish that the regulations were genuinely responsive to safety because they could not justify the broad definition of towing. Pet.App., 13a-14a. (Petitioners failed to "articulate a reason as to why the Scheme must be enforced against all tow trucks anywhere within the City in order to reduce chasing, or how that broad enforcement is genuinely responsive to safety concerns.")[5]

Turning to the second part of the *Loyal Tire* test, the Second Circuit first considered Petitioners' argument that the regulatory scheme as a whole has served to reduce chasing and improve public safety. Pet.App., 12a-13a. ("The City argues that the regulations have helped reduce chasing, which has correspondingly improved public safety."). Assessing

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to the scheme. Petitioners did submit additional papers as to the legislative history, which the court below considered in reaching its opinion.

[5] The true motivation behind the expanded definition was succinctly explained at trial by the Deputy Commissioner of Consumer Affairs who testified that the purpose was to relieve enforcement officers of the burden "'to prove that this industry wasn't lying every time you stopped them.'" *Automobile Club of New York, Inc. v. Dykstra*, 326 F. Supp. 2d 568, 571 (S.D.N.Y. 2004).

this argument in the context of the record evidence in the District Court, the Second Circuit recognized the complete failure of Petitioners to introduce any evidence to support their claim of effectiveness. Pet. App., 13a. The Second Circuit did not end its inquiry here. To the contrary, the Second Circuit accepted the unsubstantiated assertion by Petitioners that it furthered safety and analyzed the relationship of the expanded definition of towing to the safety justification asserted. Pet.App., 13a. As to this, the Second Circuit rightly held that Petitioners failed to articulate "a reason as to why the Scheme must be enforced against all tow trucks anywhere within the City in order to reduce chasing, or how that broad enforcement is genuinely responsive to safety concerns." Pet.App., 13a-14a.

REASONS FOR DENYING THE PETITION

I. NO GENUINE CONFLICT EXISTS AMONG THE CIRCUITS.

We agree with Petitioners that this Court acted purposefully in creating the standard in *Ours Garage*. The Second Circuit properly applied *Ours Garage* to the facts of this case and found that Petitioners failed to meet their burden of proof. Since this Court has no interest in reviewing Petitioners' quarrel with the fact finding in the lower courts, it is necessary for them to manufacture a split among the circuits. *See*, Sup. Ct. R. 10.

Petitioners fail to appreciate the holding of *Ours Garage*. By focusing their clever argument on only one discrete component of the "genuinely responsive to

safety" standard – the word "responsive," they completely ignore the importance of the word "genuinely." Worse, Petitioners really seek a standard that would allow the use of "safety" as a pretext for economic and other regulation – precisely what the FAAA Act sought to eliminate. Clearly, this will not address the "patchwork of regulation" that Congress sought to address in the FAAA Act. H.R. Conf. Rep. 103-677, 1994 U.S.C.C.A.N. 1715, 1994 WL 440339, *87. And it certainly does not reflect the *Ours Garage* standard.

The proposed standard would severely limit inquiry solely to the language contained in the legislative history. Pressing the point further, Petitioners argue that mere conclusory safety justifications are sufficient to avoid preemption. No circuit court supports this approach and indeed, the Ninth Circuit fundamentally disagrees. *Tillison v. City of San Diego*, 406 F.3d 1126, 1130 (9th Cir. 2005) (a legislature's "expression of intent and purpose" is not dispositive to the question of whether the safety exception applies to preempted regulations).

The distinction in the caselaw is factual, not legal. Although true that the above-cited cases all affirmed the validity of the challenged regulations, it is similarly true, as the Second Circuit observed, that "no court has upheld a licensing scheme as restrictive" as the one advanced by Petitioners here. Pet. App., 14a.

Here, the sweeping impact of the scheme went well beyond the targeted measures in the cases cited above. Under the scheme, any tow truck present within the borders of the City of New York, even if it is not within

the City to engage in chasing, could be seized without a license. Indeed, any tow truck entering the City – even if it had no intention of providing any towing services – risked seizure.[6] The propriety of such an expansive scheme had not been addressed by any circuit prior to this case.

Virtually all of the cases relied upon by Petitioners concern narrowly drawn regulations aimed at a similar purpose. Setting aside the obvious factual differences, the legal standard applied is virtually indistinguishable. In every case cited by Petitioners, the circuit courts looked beyond mere conclusory statements of legislative intent. The caselaw is replete with interest and concern in contemporaneous evidence explaining how the challenged regulations genuinely respond to safety.

First, in *Galactic Towing, Inc. v. City of Miami Beach*, 341 F.3d 1249 (11th Cir. 2003), the Eleventh Circuit assessed the propriety of regulations narrowly tailored toward towers who sought to engage in non-consensual towing of unauthorized vehicles from private parking lots without the permission of the vehicle owner. *See*, *Galactic Towing, Inc. v. City of Miami Beach*, 274 F. Supp. 2d 1315, 1316 (S.D. Fla. 2002). The Eleventh Circuit, however, did not simply rely upon the assertion of the legislature that it intended the regulations to be safety related –

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[6] This includes Long Island based tow trucks needing to pass through the City to access other states, such as New Jersey, Connecticut, and Pennsylvania, as well as tow trucks dispatched by Respondents to fix a flat tire or revive a dead battery.

although the legislative history amply stated the intent and purpose of and provided a rationale and support for the challenged regulations. *Id.* Rather, the court considered evidence proffered by the City of Miami Beach on how the challenged provisions impact the safety concerns in the legislative history. *Galactic Towing*, 341 F.3d at 1253. (City offered affidavits that showed "how the challenged sections of the City's vehicle towing ordinance affect *safety concerns*") (emphasis in original).[7]

Similarly, in *VRC, LLC v. City of Dallas*, 460 F.3d 607 (5th Cir. 2006), the Fifth Circuit considered a narrow challenge to regulations aimed at regulating "non-consent towing services from private property in Dallas, Texas." *Id.* at 608. In defense, the City of Dallas introduced evidence to show the intended effect of the regulations in support of its clear legislative purpose. *Id.* at 615 (citing testimony of a city administrator of his experience with "confrontations between citizens and tow truck drivers and that the signs had been helpful").[8] The Fifth Circuit relied

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[7] The Eleventh Circuit cites to *Cole v. City of Dallas*, 314 F.3d 730 (5th Cir. 2002), a case relied upon by Petitioners, in its analysis of *Galactic Towing*. However, *Cole* has no application to the proper interpretation of *Ours Garage*. In *Cole*, the Fifth Circuit held that *Ours Garage* provides no standard to determine the scope of safety regulations permissible under 49 U.S.C. §14501(c)(2)(A). *Id.* at 733. Absent this guidance, the Fifth Circuit relied upon pre-*Ours Garage* cases, including *Ace Auto Body* in creating a standard of analysis. *Id.* at 734.

[8] Although the *VRC* Court purports to distinguish *Loyal Tire*, the instant case leaves no doubt that the Fifth Circuit incorrectly read

upon both a specific statement of legislative intent and the city administrator's testimony explaining the intended impact of the regulations in furtherance of the legislative intent and reasonably found them genuinely responsive to safety. *Id.* ("Logically, the signs could prevent drivers from parking where they were at risk of being towed, help to defuse the anger of some who actually were towed, and ... reduce the drain on police resources caused by false stolen car reports.").

The decision in *VRC*, much like the case at hand, evinces a concern beyond mere conclusory allegations of legislative intent. Perhaps recognizing this, Petitioners deride the evidence considered as "conclusory." The fact is that Petitioners failed to proffer any evidence conclusory or otherwise. Given the stark difference in the two factual records, it is sheer speculation to suggest that the Second Circuit would have reached a different result on the facts in *VRC*.

Third, the Ninth Circuit in *Tillison* also looked at a challenge to a regulation limited to removing unauthorized vehicles from private parking lots without the consent of the vehicle owner. Relying primarily on cases such as *Galactic Towing* to uphold the limited regulation, the Ninth Circuit indicated a concern with how the regulation related to the specific safety purpose advanced. *Tillison*, 406 F.3d at 1130-31 (quoting, *Galactic Towing*, 274 F. Supp. 2d at 1319, n.

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the holding of *Loyal Tire*. Moreover, application of the *Loyal Tire* test to the facts in *VRC* would yield the same result.

1)(discussing evidence of how the provision is genuinely responsive to safety).

Tillison v. Gregoire, 424 F.3d 1093, (9th Cir. 2005) similarly provides no support for Petitioners. *Gregoire*, like the four cases cited above, also concerned narrow regulations directed to the non-consensual removal of vehicles from parking lots. No factual record was necessary in *Gregoire* since the plaintiff conceded that the regulations addressed a safety issue. *Id.* at 1103. Notwithstanding this concession, the Ninth Circuit nonetheless analyzed the proffered safety benefit of the regulations at length before upholding their validity. *Id.* at 1104.

For different reasons, *Tow Operators Working to Protect Their Right to Operate on the Streets of Kansas City v. City of Kansas City*, 338 F.3d 873 (8th Cir. 2003) also has no application to the case at bar. Critically, the plaintiffs failed to meet their initial burden to show that the regulations were subject to preemption under 49 U.S.C. §14501. *Id.* at 876. Thus, the Eighth Circuit need not have considered whether the regulations were genuinely responsive to safety. In any event, as in *Gregoire*, plaintiffs in *Tow Operators* conceded that the regulations were genuinely responsive to safety. *Id.*

No genuine conflict exists among the circuits. First, there is a common legal standard that pervades all of the post-*Ours Garage* cases. Similar to the approach of the Second Circuit here, each of the cases cited by Petitioners manifests an interest in and a concern for evidence beyond the safety justifications found in the legislative history. Second, all but one of

the cases relied upon by Petitioners dealt with narrowly drawn regulations focused to an identical agenda. By contrast, this case concerned 1) a different legislative concern and a broader set of regulations addressed to that concern; and 2) a demonstrably sparer factual record. Petitioners casually argue that none of the regulations considered by the other circuits would survive the Second Circuit test, but that argument is wholly speculative in light of the available evidence in those cases and Petitioners' failure to advance any evidence in this case.

II. GRANTING THE WRIT WOULD BE FUTILE

A. Respondent has a viable claim under the Commerce Clause.

Granting this petition will have no practical effect on the case since Respondent will retain a viable claim for direct injury arising under the Commerce Clause. Petitioners correctly note that the Second Circuit did not opine upon that part of the District Court's decision that found that Petitioners scheme failed this Court's balancing test in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). Petitioners attempt to elide this viable claim by misstating the basis for standing.

Respondent has never sought to assert representational standing. Rather, the Commerce Clause challenge was based upon direct injury occasioned by the Petitioners' abrupt change of policy, which resulted in full enforcement of the licensing scheme, including seizure, of any tow trucks within the borders of the City. As the District Court held, this had a direct impact on the ability of Respondent to

fulfill its core mission, in addition to the impact it had on interstate towing at large. Further, the Second Circuit affirmed the District Court's award of attorneys' fees under 42 U.S.C. §1983 on the strength of the substantial Commerce Clause claim advanced by Respondent. Pet.App., 15a ("AAA's dormant Commerce Clause claim supports the district court's award of fees")(citation omitted).

CONCLUSION

Having failed to present this Court with any "compelling reason" as set forth in this Court's Rules, the petition should be denied.

Respectfully Submitted,

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